No. 15208

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE J. SCHAEFER,

Appellant,

vs.

MILTON L. GUNZBURG, *et al.*,

Appellees.

APPELLANT'S REPLY BRIEF.

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I.

Where One Partner Has Wrongfully Terminated the Partnership, Arrogated to Himself the Partnership Assets and Profits, and Has Repudiated the Existence of the Partnership and Excluded the Other Partner Therefrom, an Action at Law May Be Maintained by the Wronged Partner for Damages and for the Partnership Profits of Which He Has Been Deprived.

As we have heretofore demonstrated, the allegations of the Complaint relative to the partnership between plaintiff and Gunzburg were but legal conclusions and, in part at least, the action was brought upon an oral agreement by which Gunzburg agreed to share his profits with plaintiff in return for the performance of the latter's services, regardless of whether or not the legal effect of that agreement was to create a partnership. As such, the parties were entitled to a jury trial upon those issues. (Op. Br. pp. 4-6, 24-35.) Appellees' Brief, however, stakes their defense of the trial court's action solely upon the ground that the Complaint alleged only a partnership, and that actions between partners may *never* be maintained at law.

(Ap. Br. pp. 23-37.) For purposes of this Reply Brief, therefore, we shall *assume* that the Complaint presented an action between partners; since, *even upon appellees' theory,* the action was nonetheless one at law, as to which the parties were entitled to jury trial.

It is true that, *as a general rule,* one partner to a *continuing* partnership may not sue another partner at law, but must bring his action in equity for dissolution of the partnership and settlement of the partnership accounts. *That rule, however, is not applicable to the case at bar.*

The application of the rule cited by appellees is dependent upon there being an existing and continuing partnership, which existence is not in issue between the parties; and that rule governs actions to redress the misconduct or wrongful acts of the defendant partner *in the conduct and operation of the existing partnership business.* The rule *does not apply* where the partnership has been dissolved or terminated, and the action is brought to recover a share of the partnership profits; nor does it apply where the action is brought for the wrongful and premature dissolution of the partnership by the defendant partner and for an aliquot share of the profits to which the plaintiff partner is entitled; nor does it apply to an action for damages and profits by a partner whose partnership interest has been repudiated or denied by his partners, and who has been by them excluded from the management and control of the partnership business, and where the assets and profits of the partnership have been converted to their own use by the erring partners. *In any of these circumstances, the wronged partner may maintain an action at law against his partners for damages and for his share of partnership profits.*

Zimmerman v. Harding, 227 U. S. 489, 494-495;
Karrick v. Hannaman, 168 U. S. 328, 337;
Johnstone v. Morris, 210 Cal. 580, 586, 292 Pac. 970;

Laughlin v. Haberfelde, 72 Cal. App. 2d 780, 787-790, 165 P. 2d 544;
Wilson v. Brown, 96 Cal. App. 140, 143, 273 Pac. 847;
Moropoulos v. Fuller, 186 Cal. 679, 200 Pac. 601;
Barlin v. Barlin, 145 A. C. A. 456, 459-460, ... P. 2d .....;
Elsbach v. Mulligan, 58 Cal. App. 2d 354, 369-370, 136 P. 2d 651;
Cases Collected, 168 A. L. R. 1098-1099, 1106-1109.

That the case at bar is brought within these recognized exceptions to the general rule is readily demonstrable from the allegations of the Complaint. *Far from alleging the existence of a continuing partnership*, the Complaint alleged that the partnership had been repudiated and terminated by defendant Gunzburg. [R. 28.] Such unilateral conduct by one partner is sufficient to accomplish an immediate dissolution and termination of the partnership. (*Calif. Corps. Code*, Sec. 15031(2); *Karrick v. Hannaman*, 168 U. S. 328, 335-336.)

The Complaint further alleged that defendant Gunzburg repudiated the partnership and denied that plaintiff had any interest therein [R. 28]; and that Gunzburg excluded plaintiff from all participation in the conduct of the partnership business and arrogated to himself the sole management and control of the business, and converted to his own use all of the assets and profits thereof, with the conspiracy and connivance of the other defendants, and with the intent and design of depriving plaintiff of his rightful or any share of such assets and profits. [R. 28-34.] The Complaint prayed, among other things, for the share of partnership assets and profits of which plaintiff was thus deprived, and for money damages for the wrongful acts of defendants therein alleged. [R. 37, 39.]

These allegations, therefore, established plaintiff's action as one for damages and profits arising out of the wrongful dissolution and termination of the partnership, the repudiation of plaintiff's interest therein, and the exclusion of plaintiff from the management and control thereof; and not merely as an action for dissolution and settlement of an existing and continuing partnership.

That, upon the aforesaid allegations, an action lies at law, and not in equity, does not rest in doubt.

In the leading California case of *Laughlin v. Haberfelde, supra,* 72 Cal. App. 2d 780, 787-790, plaintiff alleged the formation of a partnership with defendants to perform certain manufacturing contracts; the repudiation and dissolution of the partnership by defendants; the exclusion of plaintiff from the affairs of the partnership; and defendants' appropriation and conversion of the partnership assets and profits. Plaintiff sought judgment for, among other things, his rightful share of the partnership profits. The trial court sustained a demurrer to the complaint on the ground that, as the action was between partners, plaintiff's only remedy was by suit in equity for dissolution, whereupon plaintiff appealed.

The judgment was reversed by the District Court of Appeal on the ground that plaintiff had pleaded a cause of action at law and was not limited to suit in equity for dissolution. In an exhaustive review of the California authorities, the Court concluded that the general rule, limiting the plaintiff to equitable action for dissolution, is applicable only where the gravamen of the action arises "out of the manner in which a partnership business has been conducted," and that it did not and does not apply where the acts complained of resulted in a dissolution of the partnership, "and where the erring partner converts to his own use its entire assets." (*72* Cal. App. 2d at 788.) In the latter case, the court held, plaintiff has a right of *action at law* for damages and

for recovery of his share of the profits and assets of the partnership.

Similarly, in *Wilson v. Brown,* 96 Cal. App. 140, 273 Pac. 847, wherein plaintiff alleged that defendant, her partner, had appropriated the partnership assets and profits to his own use and had denied the existence of the partnership and of plaintiff's interest therein and in the profits therefrom, the trial court entered a personal judgment against defendant for the amount of such profits. On appeal, defendant argued that the personal judgment was improper because plaintiff's only remedy was by suit in equity for a dissolution of the partnership and settlement of the partnership accounts.

In affirming the judgment, the District Court of Appeal recognized the general rule as stated by defendant, but held that it did not apply to a cause of action arising from the repudiation of the partnership and conversion of its assets and profits, which cause of action was properly brought at law and not in equity, stating:

> "Where, as in this case, some of the partners have excluded another and have appropriated the partnership property to their own use, the latter may treat the matter as a conversion and, without any accounting or disposition of the former partnership assets, sue the offending partners and recover against them a personal judgment in the amount of his damage."
>
> *Wilson v. Brown,* 96 Cal. App. 140, 143.

That the allegations of the Complaint bring the present case within the aforementioned exception to the general rule is abundantly clear. Having alleged the repudiation and dissolution of the partnership, his exclusion therefrom, and Gunzburg's conversion of the partnership assets and profits, plaintiff was entitled to and did bring an action at law for his damages sustained thereby, for recovery whereof he prayed specifically. [R. 39.] In

such action and upon timely demand therefor, he was entitled to a jury trial.

Similarly, *in such an action at law,* plaintiff was and is entitled to receive his proper share of the profits of which he was thus deprived, and for which he prayed; and it is no bar to such relief in an action at law that an accounting might be required or prayed in order to determine the amount thereof. In *Zimmerman v. Harding,* 227 U. S. 489, 494-495, the United States Supreme Court expressly held that a partner who has been excluded from the partnership and deprived of the profits thereof by the acts of his copartner may maintain *an action at law* for his rightful share of the profits, stating:

> "Neither is the remedy in equity for a breach of a partnership agreement exclusive. There may be at law a recovery of all the damages which result, including damages for profits prevented by a wrongful dissolution. Thus, if one member assumes to dissolve a partnership before the end of the term, the other may bring an action for damages for the breach, and recover not only his interest, but also his share of the profits which might have been made during the term. *He need not wait until the expiration of the period, and need not go into equity for an accounting, but may at law show the probable profits which he has been deprived of.*" (Emphasis added.)

To the same effect is the decision of the United States Supreme Court in *Karrick v. Hannaman,* 168 U. S. 328, 337.

The authorities cited by appellees at pages 23-25 of their Brief (the *only* authorities cited by them to this point) of course are in nowise in conflict therewith. Each of the cited cases involved an existing and continuing partnership, wherein the only matters at issue were the claims of the respective partners arising out of the con-

duct of the partnership enterprise; and none of these cases involved the termination or repudiation of the existence of the partnership by the defendant.[1]

Alleging the wrongful dissolution of the partnership,[2] the repudiation of its existence and of his interest therein by Gunzburg, and the latter's conversion of the partnership assets and profits with the conspiratorial aid and connivance of the other defendants, plaintiff clearly and unmistakably pleaded himself within the scope of the foregoing authorities. He was entitled to, and did, allege all of these facts in an action at law to recover damages for wrongful dissolution *and* his share of past and future profits of which he was thus deprived. Upon these issues, plaintiff was entitled to the jury trial which he timely and properly demanded.

In addition to the legal remedies of damages and profits sought by plaintiff, he was entitled to and did pray, in the action at law, for a declaration of his rights arising from the wrongful dissolution and conversion alleged. [R. 34.] Contrary to appellees' unsupported assertion (Ap. Br. p. 21), that prayer does not convert the action into an equitable one. Where, as here, the rights and remedies in respect of which declaratory relief is sought are essentially legal in character, and can

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[1]In *Hadley v. Ellis,* 123 Cal. App. 2d 758, 761, 267 P. 2d 442, cited by appellees, the court expressly stated that "There are some exceptions to this general rule, but this case does not come within them."

[2]Although no term was specified in the agreement, the Complaint alleged the formation of the partnership for the exploitation and licensing of the three-dimension process. [R. 8-9.] It further alleged that the exploitation was continuing in the hands of the erring partner. [R. 25.] Under California law, the term of such a partnership is coextensive with the entire period of exploitation and licensing, and the prior termination thereof by less than all of the partners constitutes a wrongful and actionable dissolution. (*Owen v. Cohen,* 19 Cal. 2d 147, 150, 119 P. 2d 713; *Zeibak v. Nasser,* 12 Cal. 2d 13, 82 P. 2d 375; *Bates v. McTammany,* 10 Cal. 2d 697, 700, 76 P. 2d 513.)

be and—as in this case—are sought in an action at law, the issues in the declaratory relief action are legal and a jury trial will be accorded the litigants as a matter of right.

F. R. C. P., Rule 57;
Dickinson v. General Accident, etc. Corp. (9 Cir.), 147 F. 2d 396, 397;
Pac. Indemnity Co. v. McDonald (9 Cir.), 107 F. 2d 446, 448.

Since, in an action at law upon the facts alleged, plaintiff is entitled to seek recovery of his share of the partnership profits converted by defendants, he is not disabled from seeking such recovery at law merely because an accounting is necessary to determine the amount thereof. Where, as here, an accounting is necessary in an action at law to determine the amount of the recovery to which plaintiff is entitled, such an accounting may be included in the prayer for relief; and it does not convert the action into an action for equity, nor does the prayer therefor constitute a waiver of jury trial. (*Cases Cited,* Op. Br. pp. 27-31.)

Nor is the picture altered by the possible complexity of the required accounting. (Appellees made no effort below, in support of their motion or otherwise, to demonstrate that the accounting *would be* complex, rather than being merely sizeable.) Where, in an action at law, the required accounting may be complex or confusing, the *actual accounting* phase of the case may be taken from the jury and tried before the court or a master. This does not, however, justify or permit the refusal to submit to the jury the issues of money damages, breach and *right to an accounting.* On these issues, the litigants are entitled to a jury trial, regardless of the presumed complexity of the eventual accounting or the mode of trial thereof. (*Cases Cited,* Op. Br. pp. 29-31.)

II.

The Character of the Legal Issues Is Not Altered, nor Plaintiff's Right to Jury Trial Waived, by a Concurrent Prayer for Relief of an Equitable Nature in the Same Complaint.

As appellees have stated more than once in their Brief (pp. 23-31), plaintiff *did* in his Complaint seek *some* relief of an equitable nature, *in addition* to his claims for legal relief as aforesaid. Thus, *in addition to, but independent of,* his claims for money damages, declaratory relief and an accounting of profits, plaintiff sought dissolution of various corporate entities and distribution of their assets by way of judicial sale and division of proceeds, an injunction against disposition of partnership property, and the appointment of a receiver.[3] [R. 36-39.]

These remedies are equitable in nature; and, insofar as the action seeks such remedies, the issues thereon are equitable. *But that fact does not convert into an action in equity that portion of the action which, independently, seeks legal relief in respect of legal issues.*

In essence, plaintiff's Complaint asserted claims to relief upon each of two theories: (1) in an action at law for damages and profits based upon the wrongful dissolution of the partnership and the conversion of its assets and profits; and (2) in an action in equity, for dissolution of the partnership and winding-up of the partnership affairs.

That these two alternative remedies are not inconsistent and may in fact be asserted in the same action has been conclusively determined by the United States Supreme Court in *Zimmerman v. Harding, supra,* 227 U. S.

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[3]*In respect of the equitable relief sought,* plaintiff alleged the inadequacy of his legal remedy. [R. 34.] Such allegation has pertinence only to the equitable issues and does not have the effect of transforming the legal issues or of waiving plaintiff's right to jury trial thereon. (*Johnson v. Fid. & Cas. Co. of N. Y.* (8 Cir.), 238 F. 2d 322, 325.)

489. In that case, defendant had repudiated her partnership with plaintiff, excluded him from the management of the partnership business and converted to her own use the partnership profits. Plaintiff first brought an action at law against defendant for damages and profits; and then dismissed that action, bringing a second action in equity for dissolution and winding-up of the partnership. Upon appeal from an adverse judgment in the second action, defendant contended that the bringing of the first action constituted an election of remedies, precluding the bringing of the second action for the remedies allegedly rejected by the claimed election.

In affirming the judgment, the Supreme Court held that no election had occurred for the reason that the remedies are not inconsistent or mutually exclusive; that the wronged partner in such circumstances had both his remedy at law for damages and profits *and* his remedy in equity for judicial dissolution and winding-up of the partnership; and that the pursuit of one remedy did not preclude the concurrent pursuit of the other. (*Zimmerman v. Harding, supra,* 327 U. S. at 493-495.)

That is, of course, what plaintiff has done here. Pursuant to the provisions of Rule 18(a) of the Federal Rules of Civil Procedure, plaintiff joined in his Complaint his claims to legal and to equitable relief. As this Court has heretofore expressly held, and as appellees specifically recognize, "*a joinder* of a *legal claim for damages* with equitable claims did not deprive the plaintiff of a right to a jury trial on his legal claim." (Ap. Br. p. 23.)

Bruckman v. Hollzer (9 Cir.), 152 F. 2d 730, 732-733;

Ring v. Spina (2 Cir.), 166 F. 2d 546, 550.

No significant effect can be given to the fact that plaintiff stated claims to legal and equitable relief in the same count of the Complaint, whereas in *Bruckman v. Hollzer*

such claims were separately stated.[4] They may properly be stated in a single count, where no objection is made thereto, without waiver of jury trial upon the legal claims.

Leimer v. Woods (8 Cir.), 196 F. 2d 828, 833;
Russell v. Laurel Music Corp. (S. D. N. Y.), 104 Fed. Supp. 815, 816.

It does not assist appellees to label plaintiff's claims for damages, declaratory relief and profits as being merely "incidental" to his claims for equitable relief. The mere fact that both types of relief are sought does not transform either into a mere "incident" of the other. ". . . the prayer for equitable relief is no more controlling than the prayer for money damages in determining the essential nature of the complaint."

Ralph Blechman, Inc. v. Kleinert Rubber Co. (S. D. N. Y.), 98 Fed. Supp. 1005, 1006.

As we have observed, plaintiff's claim for legal relief arises directly from a set of facts alleged which would and do give rise to an action at law therefor, wholly without reference to the existence or assertion of any rights in equity. Such relief as is there sought is available independently of whether or not equitable relief is sought or recovered; and it is not (as in *N. L. R. B. v. Jones & Laughlin Steel Corp.,* 301 U. S. 1, cited by appellees) available only as "a mere incident of a limited statutory equitable relief."

Bruckman v. Hollzer, supra, 152 F. 2d at 731.

Since the legal relief sought is recoverable in an action at law without necessity of resort to equitable jurisdiction, and would be so recoverable herein even if the Complaint had not *also* invoked the jurisdiction of equity, it follows

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[4]Appellees did not seek, by motion or otherwise, to have such claims separately stated.

that it is not "incidental" to the equitable relief sought; and plaintiff is therefore entitled to a jury trial thereon.

Bruckman v. Hollzer, supra;
Cases Cited, Op. Br. pp. 20-21.

By the same token, plaintiff was entitled, in order that his right to jury trial should be "preserved . . . inviolate," to have the legal issues first determined by a jury, following which the equitable issues remaining and undecided should be determined by the court.

Leimer v. Woods, supra, 196 F. 2d at 834;
Bruckman v. Hollzer, supra, 152 F. 2d at 733.

III.

The Denial of Timely Demanded Jury Trial Being Error, That Error Was Demonstrably Prejudicial and Requires Reversal of the Judgment Below.

It is difficult for us to understand the legal basis upon which appellees assert that the judgment must be affirmed because the pending appeal does not have "those qualities which commend the sympathetic review of an appellate tribunal." (Ap. Br. p. 4.) It is apparently argued by appellees that, because the case was in fact tried and extensively briefed and involves no earth-shattering legal propositions, and because the findings of the court upon conflicting evidence are not clearly erroneous, a court trial is good enough; and that this case should not be reversed and remanded merely because plaintiff preferred and was erroneously denied a jury trial! Such an argument, we submit, places entirely too low a price upon rights secured by the United States Constitution.[5]

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[5]The absurdity of this half-articulated argument is best demonstrated by the fact that its acceptance would convert a constitutionally protected right into one which, for all practical purposes, may be granted or withheld at the discretion of the trial court. Appellee's argument would leave an aggrieved litigant without appellate remedy for the erroneous denial of a jury trial. The order of the trial court is not appealable, apart from appeal from a final judgment in the cause. (*Zamore v. Goldblatt* (2 Cir.), 201 F. 2d 738;

Actually, the question on this appeal is not whether the trial court fairly conducted the trial, nor whether a jury, given the opportunity, might have reached the same result, nor whether the findings below are clearly erroneous. The sole question is whether plaintiff was entitled to a jury trial. If he was, and if the evidence would have sustained a judgment in his favor, then the denial of a jury trial was necessarily prejudicial, and plaintiff is entitled to a reversal of the judgment and remand for trial in the mode chosen by him, regardless of the length or essential fairness of the trial below.

The applicable authorities universally so hold:

Jacob v. City of New York, 315 U. S. 752-753;

Dickinson v. General Accident etc. Corp. (9 Cir.), 147 F. 2d 396, 397;

Leimer v. Woods (8 Cir.), 196 F. 2d 828, 833-834, 836-837;

Bowie v. Sorrell (4 Cir.), 209 F. 2d 49, 51;

Barber v. Turbeville (C. A. D. C.), 218 F. 2d 34, 37.

A. Plaintiff's Evidence Was Clearly Sufficient to Sustain a Verdict in His Favor and to Prevent the Direction of a Verdict in Favor of Appellees.

In an attempt to insulate the judgment below from reversal, notwithstanding the error in striking plaintiff's demand for jury trial, appellees blandly assert that the evidence was such as to have required the direction of a

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In re Chappell & Co. (1 Cir.), 201 F. 2d 343, 344.) The propriety of review by prerogative writ under Section 1651 of the Judicial Code is at best subject to grave doubt. (*In re Chappell & Co., supra; Petsel v. Riley* (8 Cir.), 192 F. 2d 954, 955.) The only review available to the litigant seeking a jury trial is upon appeal from an adverse judgment after a non-jury trial on the merits. (*In re Previn* (1 Cir.), 204 F. 2d 417, 418-419.) If, however, as appellees suggest, even the erroneous order of the trial court will be sustained if the non-jury trial to which plaintiff was forced was fairly conducted and the findings sustained by conflicting and disputed evidence, the constitutional guaranty is wholly ineffectual against error below. Such a procedure does not "preserve inviolate" the right of trial by jury.

verdict in their favor. (Ap. Br. pp. 32-38.) To support this assertion, they resort to an argumentative review of all of the evidence most favorable to them; most of that evidence being directly contradicted by the evidence offered by plaintiff, by the documents prepared and signed by the parties, and by the surrounding circumstances.

In this summary, appellees wholly ignore the testimony of plaintiff to the making of the agreement with Gunzburg [R. 137-202]; the plethora of correspondence between the parties and the press releases prepared by Gunzburg eloquently proclaiming the existence of the agreement upon which plaintiff sued [see, *e. g.,* Exs. A-E, 1-43]; and the testimony of not less than *twelve* independent and disinterested witnesses [R. 614-617, 639-650, 681-686, 732-743, 763-784, 789, 794, 797, 798, 812-818, 832-833, 981-984, 1013-1018, 1041-1050, 1077-1089, 1137-1145, 1775-1777] to statements and admissions by defendant Gunzburg, which were either direct acknowledgements of the existence of the partnership or wholly inconsistent with the hypothesis of its non-existence.[6] The most pertinent elements of that evidence have been heretofore summarized by us. (Op. Br. pp. 10-12, 14-16, 36-37.)

Appellees also wholly ignore the legal principle which governs consideration of their argument that a direction of a verdict in their favor would have been proper, as that principle has been recently stated by the United States Supreme Court:

> "It is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the

[6]Within available space limitations, we cannot review all of the evidence and the inferences therefrom which would not only support a verdict for plaintiff but, we submit, make the rendition

case of a litigant against whom a peremptory instruction has been given."

Wilkerson v. McCarthy, 336 U. S. 53, 57;
Kyle v. Swift & Co. (4 Cir.), 229 F. 2d 887, 889;
Milprint, Inc. v. Donaldson Chocolate Co. (5 Cir.), 222 F. 2d 898, 901-902.

So judged, the evidence herein would unquestionably have precluded the direction of a verdict for appellees. Plaintiff's testimony and that of twelve disinterested witnesses, if believed, was amply sufficient to sustain the allegations of the Complaint; and plaintiff was entitled to have the credibility of that testimony assessed by a jury and not by the trial judge in the direction of a verdict. The purposeful summary by appellees of the evidence deemed most favorable to them *might* have convinced a jury of the merit of their defense, but it does not even remotely establish that defense conclusively and as a matter of law.[7] It follows, then, that the denial of a jury trial was prejudicially erroneous. (*Cases Cited,* Op. Br. pp. 37-38.)

B. The Issue of Unclean Hands Was, by Direction of the Trial Court and Agreement of the Parties, Expressly Deferred and All of Plaintiff's Evidence Thereon Withheld, Pending Determination of the Existence of the Agreement Sued Upon. In Its Decision, for This Reason, the Trial Court Expressly Declined to Pass Upon That Issue. Upon That Record, the Defense of Unclean Hands Has No Pertinence to This Appeal.

We recognize that the enthusiasm of the appellate advocate may often turn fair argument into innocent mis-

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thereof almost a compelled conclusion. The attention of the Court is respectfully invited to plaintiff's summation herein [R. 1786-1811], which, we believe, clearly demonstrates the probative force of plaintiff's case.

[7]The remarks of the trial judge in rendering judgment for appellees clearly indicate that his determination resulted from a resolution of conflicting evidence upon the preponderance of that evidence, and not as a matter of law. [R. 1812-1813]. See also, *Johnson v. Fid. & Cas. Co. of N. Y.* (8 Cir.), 238 F. 2d 322, 326.

statement; and that the line between such innocent misstatement and deliberate misrepresentation of the record is not always an easy one to draw. We would like to believe that appellees have been guilty only of the former, and not of the latter, in their argument that the judgment must be affirmed because plaintiff came into court with "unclean hands", apparently as a matter of law. (Ap. Br. pp. 39-45.)

Wholly apart from the lack of factual foundation for that charge, this is the clear and undeniable state of the record below upon the issue of "unclean hands":

1. The issue was tendered as an affirmative defense by appellees. [R. 70.] Their view of the facts upon which that defense rested was also asserted by them in a counterclaim for money damages. [R. 74-81.] To that counterclaim, plaintiff answered, denying each of the pertinent factual allegations, and affirmatively alleging the true facts, upon proof of which it would be clear that plaintiff was guilty of no wrongful or actionable conduct. [R. 90-98.]

2. Upon cross-examination of plaintiff, appellees' counsel announced an intention to go into the subject of unclean hands. After only a few questions had been asked, the court announced that it would hear no evidence at that time upon the subject, but would *later* pursue the subject if it became relevant, and directed appellees' counsel to make *an offer of proof.* [R. 434.]

3. Appellee's counsel then made *an offer of proof,* of matters not then or thereafter in evidence, all of the elements thereof being denied by plaintiff. [R. 442-447.] Following the completion of the offer of proof, the trial court stated that it would not consider evidence on the issue unless it should subsequently determine the existence of a partnership between the parties, making a ruling upon that issue necessary; in which event it would "reopen the case for additional evidence" thereon. [R. 447.]

4. Subsequently, in reply to query by plaintiff's coun-

sel as to whether the issue of unclean hands was then before the court, the court instructed Mr. Selvin (plaintiff's counsel) that it would not hear evidence thereon. [R. 511-515.] In fact, the trial court stated:

> "I want to say this, that I have no intention of making any findings on unclean hands one way or the other until after I have disposed of the question of whether or not there was this alleged agreement." [R. 513.]

In view of this unequivocal ruling by the court, Mr. Selvin refrained from offering plaintiff's evidence upon the issue, *and specifically informed the court and appellees' counsel that he was so refraining.* [R. 527.] The trial court subsequently repeated and reemphasized its exclusionary ruling. [R. 600-601.]

5. That appellees also understood that the issue was not to be tried at that time clearly appears from the statement of their counsel, acknowledging that plaintiff had not presented evidence upon that issue in the light of the trial court's ruling, and that *neither party* would "at this time go into the matter of unclean hands." [R. 1088-1089.]

6. The trial court did not reopen the case for the consideration of evidence upon unclean hands and in its Memorandum Opinion stated that "I am making no ruling on the defense of unclean hands raised by defendants and shall make no finding thereon." [R. 100.] In its Findings of Fact and in its Final Judgment, the trial court again recited that *"No evidence was received by the court"* with respect to that issue, inasmuch as "it was unnecessary to consider or rule" thereon. [R. 101, 110. (Emphasis added.)]

The state of the record set forth above shows beyond contradiction, *and beyond possibility of mistake or misapprehension,* that the trial court had ruled out of its consideration any evidence on unclean hands; and that, in express compliance with the court's ruling, plaintiff

had not offered evidence to show the true facts with reference thereto, which facts would have shown the defense to be without merit. To assert in the light of these facts, as appellees do assert, that the testimony on the subject "stands uncontradicted on the record" and that plaintiff has "made no effort to explain it away or "to justify it in his appeal" (Ap. Br. p. 44), is little short of outrageous! Candor and fairness require of appellees greater respect than their argument exhibits.

That a record so incomplete upon the issue cannot be considered by this Court for the purpose of ruling thereon as a matter of law hardly requires demonstration.[8]

Whether or not unclean hands exist in respect of certain conduct is a *question of fact* for resolution in the first instance by the trier of fact. Consideration of a defense premised thereon can and will be given only when *the facts* pertinent to that defense *are properly before the court.*

Moss Estate Co. v. Adler, 41 Cal. 2d 581, 584, 261 P. 2d 732;

Stone v. Lobsien, 112 Cal. App. 2d 750, 757-758, 247 P. 2d 357.

That situation does not exist here. In the first place, an offer of proof, an unoffered deposition, and inadmissible hearsay to which timely objection was made (which admittedly constitute the "evidence" upon the issue in the record) do not constitute "facts properly before the court." Secondly, the trial court expressly excluded most of the evidence on the subject, including *all* of plaintiff's evidence thereon, for the reason that it

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[8]In view of these facts, it is neither appropriate nor useful to argue in this Reply Brief the effect and meaning of evidence which was not offered, upon an issue which was not tried. To indicate in brief fashion, however, the true facts upon this issue which we were and are prepared to prove, we have appended hereto an analysis of appellees' claims and of the actual facts, as an appendix to this Brief.

was not going to rule on the issue. Certainly, this court will not rule as a matter of law upon an issue as to which the trial court declined to rule because it had not heard the evidence thereon. And, finally, the trial court specifically declined to make any finding upon the issue, excluding it from the issues adjudicated. If the refusal to make a finding thereon was error (and we submit in the light of the record that it was not), appellees have filed no appeal herein and they are consequently precluded from asserting that such refusal was erroneous and from going beyond the ground of decision below.

Peoria & P. U. Ry. Co. v. United States, 263 U. S. 528, 536;

Stepp v. McAdam (9 Cir.), 88 F. 2d 925, 927.

Moreover, the "evidence" which appellees conceive to support their defense consists in no pertinent respect of competent evidence contained in the record upon this appeal. (See Appendix, *infra.*) It follows, then, that the dubious merit of the defense is not now available to appellees or properly before this court.

Dictograph Products Co. v. Sonotone Corp. (2 Cir.), 231 F. 2d 867;

United States v. Ashe (3 Cir.), 176 F. 2d 606, 607.

Conclusion.

Even viewed only as an action between partners, plaintiff's Complaint herein alleged the formation of a partnership for a specific purpose, the wrongful dissolution of the partnership by defendant Gunzburg before the expiration of its term, the repudiation by Gunzburg of the partnership and of plaintiff's interest therein, and the conversion and appropriation by Gunzburg with the conspiracy and connivance of the other defendants of all of the assets and profits of the partnership. Upon these facts, plaintiff had available to him two concurrent and complementary remedies: an action at law for wrongful dissolution and for damages and an accounting of profits

of which he was thus deprived; and an action in equity for a judicial winding-up of the partnership and distribution of its assets and properties. It was the clear purpose of Rule 18(a) of the Federal Rules of Civil Procedure to make both of these remedies available to plaintiff in a single action. Such joinder of claims to relief did not deprive plaintiff of his Constitutional right to a jury trial upon the legal claims asserted. Nor is the legal relief sought in any respect "incidental" to the equitable relief, since such legal relief can be asserted, proved and resolved independently of the equitable claims and is in nowise dependent upon the attachment of equity jurisdiction.

Having asserted his rights in the manner and at the time provided in the Rules by which this action is governed, plaintiff was entitled, as a matter of Constitutional right, to a trial of the issues in the mode chosen by him. Plaintiff's evidence was amply sufficient to have sustained a jury verdict in his favor; and he is not now precluded from relief by appellees' assertion of a defense which was not litigated or determined below, and which, had it been so litigated, must have resulted in its resolution in favor of plaintiff.

It follows that the error below in striking plaintiff's demand for jury trial and in proceeding to trial without a jury was indisputably prejudicial to rights guaranteed plaintiff by the United States Constitution; and that the judgment below must be reversed and the cause remanded for retrial of the legal issues by a jury; subsequently to or concurrently with which the court may determine the equitable issues.

Respectfully submitted,

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Of Counsel.

APPENDIX.

The Evidence on the Defense of Unclean Hands.

As we pointed out in the body of our Reply Brief (Point III, B, *supra*), the record before this Court contains only a very small part of the total evidence in respect of the defense of unclean hands. The record contains *none* of the evidence which would have been offered by plaintiff to demonstrate conclusively that the defense is wholly without merit, such evidence having been withheld at the direction of the trial court.

In normal circumstances, we would never attempt to discuss or argue evidence before this Court which cannot be found in the record before it. Appellees, however, have taken advantage of the incomplete state of the record to toss about with profligate abandon unsupported characterizations of the evidence as "uncontradicted" and "indisputable", and have made reference to such evidence as *is* in the record in manners which the record flatly contradicts. This hyperbolic recital is tendered by appellees to the Court with their solemn assurance that it is all true and not subject to any possible dispute.

We cannot permit these extravagant assertions to go unchallenged and uncorrected.

We shall, accordingly, indicate in this Appendix the true nature of the evidence *in* the record which appellees have erroneously and unfairly purported to state; and shall also indicate, in summary fashion, the true facts as we would have shown them to exist at the trial and as we shall show them to exist upon retrial. In this latter respect, we should not be understood as relating evidence which is properly before this court, or as claiming that such evidence should be considered by it; but that we do so solely for the purpose of showing the gross inaccuracy

of appellees' claims that the "evidence" which they relate is conclusive and beyond dispute:

1. Appellees appear to detect a heinous quality in certain discussions plaintiff allegedly had with Arch Oboler concerning the manufacture of viewers allegedly "in competition" with those marketed by plaintiff and Gunzburg. (Ap. Br. p. 42.) They neglect to inform the court that these "negotiations" were not conducted without Gunzburg's knowledge, but *were* conducted by plaintiff *with Gunzburg's express authorization and approval,* and that plaintiff thereafter voluntarily abandoned the transaction before anything was done, because of its possibly competitive aspects! [R. 594-600.]

2. Much is made by appellees of "evidence" that, at a "secret" meeting with the officials of Polaroid Corporation, plaintiff allegedly advised these officials "whom they should turn to in place of Gunzburg." (Ap. Br. p. 42.) In the course of this one-sided recital, appellees apparently found it quite unnecessary to inform the court of the following *facts* concerning that matter:

a. The meeting was not "secret," nor was it arranged by plaintiff. It was initiated and requested by the Polaroid officials. [R. 741.]

b. The meeting was held *after* Gunzburg had repudiated his agreement with plaintiff and refused to recognize plaintiff's interest in the venture. [R. 453-454, 458, 741.]

c. Prior to that meeting, Polaroid had determined irrevocably that, because of Gunzburg's intransigence and the unpleasant relations caused by Gunzburg's unreasonable conduct, it would not renew the contract; had so informed Gunzburg; and had informed him that the decision not to renew was irrevocable.

[R. 737-741, 779-783.] Gunzburg had so informed plaintiff. [R. 455-456.]

d. *At the meeting, plaintiff made a very vigorous and determined "pitch" to persuade Polaroid to revoke its previous decision and to renew the contract.* It was only *after* he was informed that there was not the slightest chance of renewal that he discussed alternatives with the Polaroid officials. [R. 454, 457-458, 741-742.]

e. Nothing that plaintiff said or did in any manner or respect led to or resulted in Polaroid's decision not to renew the contract. [R. 743, 784.]

3. Appellees appear to find comfort in a claim that plaintiff, while engaged in efforts to *sell* a motion picture in which he and Gunzburg had the right to receive 20% of the profits, "negotiated secretly to join with United Artists *in buying* the picture." (Ap. Br. pp. 42-43.) (For unexplained reasons best known to appellees, the reference to the record claimed to support this charge is found tucked away in a footnote in their Brief.)

When the record reference in question is examined (as appellees apparently hoped it would *not* be examined), it will be observed that the "evidence" allegedly supporting this charge consists only of a hearsay memorandum, *written by a man named Robert Benjamin to a man named Arthur Krim,* which memorandum was never shown and the contents thereof never communicated to any party to this action! [R. 670-673.] Neither the writer nor the recipient of the memorandum was or is a party or privy to this action, and to this date we are wholly unenlightened as to any possible theory upon which appellees claim or purport to believe that such a

memorandum is admissible in evidence against plaintiff. To the introduction of this document timely and proper objection was made.[1] [R. 671-672.]

The document relied upon was not introduced at the deposition of Benjamin, its author, nor at that of Krim, its recipient, but was introduced at the deposition of one *Seymour Peyser.* Although appellees had originally noticed the deposition of Benjamin, their counsel announced at the close of the Peyser deposition that he did not intend to take the Benjamin deposition, whereupon plaintiff's counsel proceeded to take that deposition. [R. 703-704.]

Benjamin, the author of the document from which appellees profess to deduce such startling inferences, then testified that the document was essentially jocular, that plaintiff had sought to induce United Artists to purchase the picture, and that as evidence of his belief that what he was offering to United Artists was a "good deal" for the buyer as well as for the sellers he represented, plaintiff suggested that he would be willing to invest with United Artists in the purchase, *provided that the parties (including Gunzburg) upon whose behalf he was selling the picture would consent and permit him to participate in the purchase.* [R. 706-708.]

4. The major element of appellees' unclean hands defense appears to be an abortive and unsuccessful attempt by plaintiff to sell to one Alperson the motion picture eventually sold to United Artists. With candor not

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[1]Significantly, when, at the taking of the deposition at which the document was produced, objection was made to the document, appellees' counsel not only followed the usual procedure of attaching the document to the deposition as an exhibit, but also took the very unorthodox step, for purposes at which we can only guess, of reading that document into the body of the deposition!

elsewhere displayed in their argument, appellees tacitly concede that the record is totally devoid of *evidence* relating to this transaction, the trial court having then announced its willingness to hear or consider evidence relating to unclean hands.

Appellees accordingly have asked this Court to rule upon the defense of unclean hands on "facts" contained *only* in an unsworn *offer of proof* made by appellees' counsel. [Ap. Br. p. 43; R. 423-447.] An offer of proof, of course, is not evidence, and cannot support affirmance of a judgment by an appellate court.

Lyon v. Davis, 111 Ind. 384, 12 N. E. 714;
Harris v. Tomlinson, 130 Ind. 426, 30 N. E. 214.

Nor can this court consider as "evidence" appellees' characteristically extravagant summary of "appellant's own testimony" *in a deposition which was never offered or read in evidence and which is not part of the record on this appeal.* Such a deposition cannot be considered for any purpose by an appellate court.

Dictograph Products Co. v. Sonotone Corp. (2 Cir.), 231 F. 2d 867;
United States v. City of Brookhaven (5 Cir.), 134 F. 2d 442, 446-447.

Of course, the *true facts* relating to this transaction, which we were and are prepared to prove at such time as proof thereof becomes relevant, bear little relation to the "facts" appellees claim that they can prove, and demonstrate conclusively that plaintiff was guilty of no wrongdoing. In the interests of saving space by *not* arguing matters which are not in the record, we respectfully refer this Court to the allegations of plaintiff's Answer to defendants' First Counterclaim, relating to the Alperson transaction. [R. 90-97.] We respectfully and

in good faith represent to this Court that we could and can prove, and were prepared to prove to the trial court had it not declined to hear evidence on the subject, each and all of the facts therein alleged.

That proof would have shown that plaintiff did not seek to make a secret profit upon the sale, but instead indicated that he would forego his sales commission as a personal investment, to induce Alperson to make the purchase upon terms more favorable to plaintiff's principals than plaintiff or his principals had been able to obtain elsewhere;[2] that plaintiff would not have gone through with his participation in the transaction unless and until, upon a full disclosure of the facts, everyone (including Gunzburg) consented and approved that participation; and that it was *plaintiff* who recommended against the acceptance of the Alperson offer because, upon further consideration, he had concluded that its acceptance would not be to the benefit of the *sellers*.

It follows, then, that upon such proof no factual foundation exists for application of the doctrine of unclean hands to the decision of the case at bar.

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[2]We do not overlook appellees' gross misrepresentation that others wanted to purchase the motion picture "at a much higher figure" than $2,000,000.00. (App. Br. p. 43.) (Appellees strangely neglect to inform this Court that their impressive list of record references allegedly supporting this assertion do not refer to any competent evidence thereof but only to what their counsel stated he thought he could prove if the trial court would permit him—which it did not.) Actually, there were no *offers* made by any purchasers, other than Alperson and (much later) United Artists, *at any price*. Far from having people who "wanted to purchase the picture" at fabulous prices, the sellers had been striving desperately to solicit buyers therefor, and had gotten *no* offers!